



[4910-13]

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 16

[Docket No.: FAA-2012-0176; Amendment No. 16-1]

RIN 2120-AJ97

Rules of Practice for Federally-Assisted Airport Enforcement Proceedings (Retrospective Regulatory Review)

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action updates, simplifies, and streamlines rules of practice and procedure for filing and adjudicating complaints against federally-assisted airports. It improves efficiency by enabling parties to file submissions with the Federal Aviation Administration (FAA) electronically, and by incorporating modern business practices into how the FAA handles complaints. This amendment is necessary to reflect changes in applicable laws and regulations, and to apply lessons learned since the existing rules were implemented in 1996.

DATES: Effective [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: For information on where to obtain copies of rulemaking documents and other information related to this final rule, see “How to Obtain Additional Information” in the SUPPLEMENTARY INFORMATION section of this document.

FOR FURTHER INFORMATION CONTACT: For technical or legal questions concerning this action, contact Jessie Di Gregory, Federal Aviation Administration, Office of the Chief

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SUPPLEMENTARY INFORMATION:

Authority for this Rulemaking

The FAA’s authority to issue rules on aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency’s authority.

This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Sections 46101, “Complaint and Investigations” and 46104, “Evidence,” and Part B, Section 47122, “Administrative.” Under these sections, Congress provided for the FAA to prescribe regulations for practices, methods, and procedures to hear complaints concerning compliance by federally-assisted airports and carry out investigations and conduct proceedings in a way conducive to justice and the proper dispatch of business. This rulemaking is within the scope of that authority because it would amend rules necessary to investigate, hear, and provide rulings on matters related to federally-assisted airport conduct.

I. Overview of Final Rule

The FAA is required by statute to adjudicate complaints on matters within the agency’s authority (49 U.S.C. 46014). Title 14 CFR part 16, Rules of Practice for Federally-Assisted Airport Enforcement Proceedings (Part 16), provides a process for investigating and adjudicating complaints against sponsors for violation of federal obligations. For this final rule, a sponsor is a recipient of federal assistance, usually an airport operator. This final rule improves the efficiency of Part 16 proceedings by providing an electronic filing alternative, opportunities for sponsors to seek early disposition of complaints in certain cases, and clarification of processes already

described in the rule. It affects those parties involved in filing and responding to formal complaints. It also affects the FAA offices involved in investigating and adjudicating those complaints.

The FAA, sponsors, aeronautical users, and other stakeholders have 17 years of experience with Part 16 as implemented in 1996.¹ In general, Part 16 has been a useful process for resolving complaints regarding sponsor compliance. The FAA does not intend to change the basic features of the process. Rather, the FAA has identified updates to Part 16 that could improve the process and reduce time required to address certain cases, based on agency and stakeholder lessons learned.

The FAA has determined that the agency, sponsors, aeronautical users, and other stakeholders in Part 16 proceedings will benefit from adding the following to the rule:

- Procedures for concluding the investigation by “summary judgment” or dismissal without an answer by the sponsor.
- Termination of complainant standing in certain cases where the FAA finds the sponsor in noncompliance on all issues raised in the complaint.
- Optional electronic filing procedures.
- Procedures for filing complaints under Title 49 CFR part 23, Participation of Disadvantaged Business Enterprises (DBEs) in Airport Concessions, and 49 CFR part 26, Participation by DBEs in Department of Transportation (DOT) Financial Assistance Programs.

In addition, the FAA has determined it will be helpful to clarify existing language in Part 16 that addresses²—

¹ 61 FR 53998, October 16, 1996.

² This list is one of general introductions. It is not intended to explain each issue in detail.

- Intervention and other participation.
- The process for ordering corrective action for noncompliant sponsors.
- Processes involving the Director, including procedures for seeking rehearing of Director's Determinations upon a showing of good cause.
- Standard of Proof and Burden of Proof requirements.
- Standards for raising new issues on appeal to the Associate Administrator.
- Consent Orders.
- Requests for testimony of agency employees.
- Processes involving the Associate Administrator, including procedures for seeking rehearing of Final Agency Decisions upon a showing of good cause.
- Transfer of responsibility for decision-making for civil rights cases.
- Availability of judicial review.
- Extension of the time period for filing pleadings by mail.

Finally, the FAA is making minor updates to terminology and organization within Part 16 as part of its revision. These changes streamline the rule and reflect current practices.

The FAA expects benefits of these changes to include a decrease in both time spent and volume of paper documents required to process Part 16 complaints.

II. Background

A. Statement of the Problem

Part 16 has not been updated since its original implementation in 1996. As described earlier in this preamble and in the NPRM, existing Part 16 processes have worked well but are in need of revision based on agency and stakeholder experience during the past 15 years. The FAA is adding new processes and revising existing processes to clarify Part 16 and apply lessons

learned to provide for more efficient use of agency and stakeholder time and resources during complaint proceedings.

B. Summary of the NPRM

The FAA proposed to update, simplify, and streamline rules of practice and procedure for filing and adjudicating complaints against federally-assisted airports found in 14 CFR part 16 (Part 16) with an NPRM published in the *Federal Register* on March 5, 2012.³ The NPRM provided a 60-day period for the public to file comments on the proposal.

On May 17, 2012, the FAA re-opened the comment period with a Notice published in the *Federal Register* in response to a request from the Airports Council International-North America (ACI-NA), an association representing the local, regional and state governing bodies that own and operate the principal airports served by scheduled air carriers in North America.⁴ ACI-NA sought additional time to complete its review and coordinate comments received from members that would be impacted by the proposed changes. The re-opened comment period closed on June 7, 2012.⁵

C. General Overview of Comments

The FAA received five comments. Two groups representing airports (the Airports Council International-North America (ACI-NA) and the American Association of Airport Executives (AAAE) provided supportive comments with suggestions to improve the rule, as did the Port Authority of New York and New Jersey. All three of these commenters have experience with responding to complaints filed under Part 16. In addition, an individual who represents complainants in Part 16 complaints also indicated support while offering specific suggestions.

³ 77 FR 13027.

⁴ 77 FR 29250.

⁵ *Id.*

One private citizen commented as well, indicating general support for the FAA's effort to revise and streamline the rule.

Commenters raised eleven issues regarding the proposal, from concerns and suggestions to improve new options for motions to dismiss and motions for summary judgment to minor editorial corrections.

III. Discussion of Public Comments and Final Rule

A. Motions to Dismiss and Motions for Summary Judgment (§§ 16.25 and 16.26)

The Port Authority of New York and New Jersey (Port Authority) and ACI-NA commented on the new options for motions to dismiss and motions for summary judgment proposed in §§ 16.25 and 16.26. ACI-NA encouraged the FAA to carefully scrutinize complaints and not docket complaints in accordance with § 16.25 that fall outside of the FAA's jurisdiction, fail to state a claim that warrants investigation, or where the complainant lacks standing. ACI-NA then pointed out that the new provisions for motions are meant to reduce paperwork for respondents and the FAA, and not increase it by requiring respondents to submit motions to dismiss in response to complaints that should not have been docketed in the first place. ACI-NA indicated that the FAA should "be more vigilant" in assessing complaints at the docketing stage. Finally, ACI-NA pointed out that as proposed in the NPRM, § 16.26 draws no distinction between motions to dismiss and motions for summary judgment. Since there are differences between the two motions, ACI-NA recommended that to avoid confusion, the FAA should distinguish between these dispositive motions in the rule and proposed specific language. ACI-NA also urged the FAA to distinguish between these two kinds of motions so that this rule would be consistent with the Federal Rules of Civil Procedure.

ACI-NA suggested substituting the word “dockets” for the word “receives” in proposed § 16.26(a) for greater consistency with deadlines throughout the rule.

The Port Authority and ACI-NA expressed concern that these sections would require the filing of motions before the docketing of a complaint. The Port Authority further stated that the provisions of § 16.26 are not consistent with the stated intent of relieving respondents of unnecessary effort in drafting an answer and compiling supporting documents, and achieving consistency with the Federal Rules of Civil Procedure. The Port Authority indicated its concern that there is a possibility under the current proposal that a respondent might be required to file an answer prior to the FAA’s determination on the motion to dismiss or motion for summary judgment. The Port Authority proposed that the FAA delete § 16.26(f) to make the rule consistent with the Federal Rules of Civil Procedure, which stay the time for filing and service of an answer during deliberations on the motion.

The Port Authority and ACI-NA also recommended that the rules for dispositive motions be located in a new § 16.28 since both §§ 16.25 and 16.27 address actions to be taken by the FAA before docketing a complaint.

The FAA continues to closely scrutinize incoming Part 16 complaints to make certain that they are in compliance with the rule. The FAA routinely returns Part 16 complaints prior to the official docketing (so that no answer is due from the respondent) when one or more requirements in the rule are not met. In a May 24, 2011 partial dismissal order, the FAA dismissed the city of New York as a party since it was not a “respondent” within the meaning of Part 16.⁶ The U.S. Court of Appeals for the Second Circuit upheld the FAA’s order on June 12, 2012.⁷

⁶ Paskar, et al. v. City of New York and Port Authority of New York and New Jersey, FAA Docket No. 16-11-04.

⁷ Paskar and Friends of LaGuardia Airport v. FAA, No. 11-2720-ag, 478 Fed.Appx. 707.

The FAA is aware of the fact that parties to a Part 16 proceeding often have differing levels of legal expertise and familiarity with the rule. The FAA also recognizes that some of those who file complaints under Part 16 do so pro se, that is, without the benefit of legal counsel. While the FAA closely scrutinizes complaints filed under Part 16, it will docket complaints that have any basis for filing under the rule. If a respondent feels that a complaint contains frivolous or extraneous issues, it can avail itself of the motions described in § 16.26. The FAA believes that these new provisions for motions will help to reduce paperwork for respondents and the agency.

The FAA agrees with ACI-NA's suggestion to more clearly differentiate between motions to dismiss and motions for summary judgment. The FAA is including the provisions on motions to dismiss under § 16.26(b). The FAA is including the provisions addressing motions for summary judgment under § 16.26(c). Sections 16.26(e) and 16.26(f), as proposed in the NPRM, are renumbered as §§ 16.26(b)(4) and (5) and 16.26(c)(4) and (5), respectively. Additionally, the FAA has restructured § 16.26 (c) to streamline it. The FAA also has added language in renumbered § 16.26(c)(4) for clarification.

The FAA is modifying section headings, organization, and introductory language to make clear that motions to dismiss are addressed in § 16.26(b), and motions for summary judgment are addressed in § 16.26(c). As a result, motions to dismiss and motions for summary judgment continue to have the same effect on filings, deadlines, and orders.

The FAA agrees with ACI-NA's suggestion to change § 16.26(a) by substituting language similar to that used in § 16.23(d). However, the FAA notes that § 16.23(d) requires an answer to be filed "within 20 days of the date of service of the FAA notification [of docketing]."

This differs from ACI-NA's assertion in their comment that § 16.23(d) requires an answer to be filed within 20 days of the FAA docketing a complaint.

B. Method of Filing (§§ 16.13 and 16.17)

Two commenters recommended improvements to the provisions regarding electronic filing and postal submissions. AAAE encouraged the FAA to improve its technological capabilities so that parties might upload and access documents through an electronic docket.

The Port Authority noted that the term "post office address" (§ 16.13(f)) is no longer accurate. It also suggested that one day be added to a prescribed period for a right or requirement to perform an act after service of a document if the document is served by overnight express delivery.

The FAA partially agrees with these comments. The FAA believes that the changes proposed to § 16.13 in the NPRM address AAAE's interest in modernizing the filing process. Anyone may access all documents regarding a particular complaint via the electronic docket on <http://www.regulations.gov>. AAAE correctly stated that parties may not upload documents to www.regulations.gov. The FAA does not find it necessary for parties to be able to do so. Proposed § 16.13 gives parties an opportunity to e-mail their pleadings to the Docket Clerk, who will then send the pleadings to the DOT Docket Staff for submission to <http://www.regulations.gov>.

The FAA agrees with the Port Authority's suggestion to replace the term "post office address" with the term "physical address" in § 16.13(f). However, the FAA finds it unnecessary to add a day to deadlines when parties choose overnight, express delivery.

C. Complaints Related to Civil Rights and Disadvantaged Business Enterprises Filed under 49 CFR 26.105(c) (§§ 16.3 and 16.21)

The Port Authority questioned the proposal to permit someone who is not "directly and substantially affected" by a sponsor's alleged violations to file a Part 16 complaint. The Port

Authority also objected to the exemption of persons filing complaints under 49 CFR § 26.105(c) from good faith efforts at informal resolution required of other Part 16 complainants. ACI-NA expressed support for these comments by reference.

The FAA notes that the provisions of 49 CFR part 26 are outside the scope of this rulemaking. Participation of Disadvantaged Business Enterprises (DBEs) in the Airport Improvement Program (AIP) is governed by 49 CFR part 26. Under this regulation, complainants are not required to be directly and substantially affected by the sponsor's alleged violations and "[a]ny person who knows of a violation of this part by a recipient of FAA funds may file a complaint."⁸ Additionally, 49 CFR § 26.105 does not mandate informal dispute resolution before filing a complaint under Part 16.

D. Oral Argument Before the Associate Administrator and Availability of a Hearing (§§ 16.33 and 16.241)

Three commenters expressed confusion over the role of oral arguments and hearings in the Part 16 process. The Port Authority, and ACI-NA by reference, suggested allowing oral argument before the Associate Administrator on appeal from a Director's Determination in certain circumstances to provide assistance to the Associate Administrator. AAEE complained that it was unclear when a sponsor may request a hearing to appeal the Director's Determination and to challenge the Director's orders.

The FAA notes that oral argument for all complaints appealed to the Associate Administrator is not required by law. A hearing, with oral argument, is required for either withholding approval or payment of grants as stated in 49 U.S.C. 47106(d), 49 U.S.C. 47111, and 47114(c) and (e). Title 49 of the United States Code, 47114(d), does not require the FAA to provide a hearing for withholding discretionary grant funds from general aviation airports.

⁸ 49 CFR 26.105(c).

Moreover, the FAA believes that allowing oral argument for all appeals of Director's Determinations would cause undue delay. When not required by statute, the FAA finds oral argument unnecessary for a fair, just, and complete process.

E. Timing of Pleadings, Director's Determinations, and Final Agency Decisions

ACI, AAAE, and a private citizen contended that the deadlines in the current rule are unrealistic and suggested extending them throughout the process. AAAE encouraged the FAA to do so while maintaining the expedited nature of the process. The private citizen made general suggestions for further revision of procedures.

The FAA did not propose changes to the timing for pleadings, Director's Determinations, or Final Agency Decisions in the NPRM because the existing process allows flexibility as needed for all parties involved. Therefore, any changes to the time periods for steps in the Part 16 complaint process are outside the scope of the NPRM.⁹

The FAA notes that deadlines for service of pleadings in §§ 16.19 and 16.23 are subject to parties' petitions for extension under current § 16.11. Parties are able to determine if they can meet the deadlines, and can request extensions if they feel more time is necessary to complete the process fairly.

The FAA's intent has been to make the Part 16 process both expedited and complete since it originally proposed the rule in 1994. The 1994 NPRM stated that a Director's Determination should be issued within six months of the FAA's receipt of a complaint, reflecting intent "to expedite substantially the handling and disposition of airport-related complaints" (in comparison to the 49 CFR part 13 process used prior to 1996).¹⁰ Part 16 was also designed to ensure a final and complete resolution of disputes because the Part 13 process did "not provide a

⁹ 77 FR 13027, March 7, 2012.

¹⁰ 59 FR 29880, 29882, June 9, 1994.

structure that regularly facilitates the final administrative disposition of airports-related cases within prescribed time limits.”¹¹

F. Burden of Proof Versus Burden of Persuasion (§ 16.23)

The Port Authority noted that proposed § 16.23(k) does not distinguish the legal concept of burden of proof from that of burden of persuasion. The commenter suggested that proposed § 16.23(k) be separated out into a new § 16.24.

The FAA notes, in response, that the Parties entering the Part 16 process have varying levels of legal expertise and familiarity with the rule. While those with legal training likely understand the difference between burden of proof and burden of persuasion, others may not. Rather than adhering to the legal definitions of these terms, the FAA has chosen the term “burden of proof” to cover both concepts to make Part 16 more accessible to all participants. The FAA finds that since burden of proof applies to all pleadings, the provision addressing it is best left as proposed in § 16.23.

G. Form of Complaints and Other Pleadings (§§ 16.23 and 16.3)

ACI-NA sought consistent application of the requirement that a complainant show “how the complainant was ‘directly and substantially affected’” by the respondent’s actions, especially regarding ripeness. It also recommended more rigorous formatting requirements for complaints. The Port Authority suggested that all pleadings be submitted according to the standards established in Federal Rule of Civil Procedure 10.

The FAA must balance reliance on the Federal Rules of Civil Procedure with its obligation to provide a fair, just, and complete process to all parties. Many complainants and some respondents file without the benefit of general or specialized legal counsel. The FAA

¹¹ Id. at 29881.

believes that adherence to strict formatting requirements for a Part 16 complaint would place an unnecessary burden on those parties.

Part 16 was designed with the Federal Rules of Civil Procedure in mind, but it was not intended to replicate the Federal Rules of Civil Procedure. Part 16 was designed for administrative adjudication that relies on flexibility.

H. Content of Pleadings (§§ 16.23 and 16.3)

Two commenters made suggestions regarding the content of pleadings received by the FAA during the Part 16 process. ACI-NA recommended that the FAA define “affirmative defense” in § 16.3 for clarity and restrict acceptance of supplemental pleadings to expedite the process. A private citizen suggested that the rules specify that a complainant may raise whatever issues and submit whatever documents it felt proper to respond to any matter raised in an answer, and that the FAA permit both parties to raise new issues at any time to ensure a full and fair Part 16 process.

The FAA notes that the term “affirmative defense,” while a legal term of art, is self-explanatory. The FAA finds it unnecessary to define this term in the Part 16 regulation. Various federal court decisions have relied upon the definition of “affirmative defense” in Black’s Law Dictionary.¹²

The FAA has two concerns regarding the suggestion that complainants be able to bring new information to the Director prior to the issuance of the Director’s Determination (i.e., during the investigatory phase). First, it would be difficult, if not impossible, to finalize the investigation and draft the decision document where new information was able to be routinely submitted to the

¹² See Black’s Law Dictionary, 9th ed. 2009, See also, e.g., *National Union Fire Insurance Co. of Pittsburgh v. City Savings FSB*, 28 F.3d 376, 393 (3d Cir. 1994), and *Starnes Family Office, LLC v. McCullar*, 765 F.Supp.2d 1036, 1048 (W.D. Tenn., 2011).

docket. In a sense, the docket would never close in some cases, and investigations might have to be re-started leading to significant inefficiencies and delay.

Second, § 16.19 currently allows parties to submit motions at any time, and for the opposing party to respond. So, there is a mechanism in place now that would permit new information to be submitted if the complainant believed that it was necessary for the FAA to consider this information. This provision allows flexibility in supplementing the record with relevant information while allowing the Director to exercise discretion to expedite the process

Concerning the suggestion that complainants should be able to bring new information to the attention of the Associate Administrator during the Director's Determination appeal process, the FAA notes that new § 16.33(f) expressly provides that new issues or evidence may be brought before the Associate Administrator if certain requirements are met. If a complainant were not able to meet these requirements, he or she would be free to file a new complaint to address the new information.

Concerning the suggestion that the FAA should state specifically that a complainant may raise any issue and submit any document necessary or desirable to respond to any denial or affirmative defense raised in the Answer, the FAA does believe that such clarification is necessary in the rule.

I. Processes Involving the Director (§§ 16.31 and 16.109)

Three commenters were concerned with clarity of language and improper extension of the Director's authority. ACI-NA commented that the language in proposed § 16.109, addressing orders terminating grants, cease and desist orders, and compliance orders, is unclear in relation to that of § 16.31, addressing Director's Determinations after investigations. AAAE suggested that the proposed changes in the Director's authority exceed legal limits and fail to clearly describe

what orders the Director could issue. The Port Authority proposed that a definition of “Corrective Action Plan” be added to § 16.3.

The FAA finds that neither the provisions in proposed §§ 16.31(c) nor 16.109(c) exceed the scope of the FAA’s authority. Under 49 U.S.C. 47107(a-e), the FAA is required to seek specific commitments from sponsors before giving those sponsors grants. Other provisions, such as 49 U.S.C. 47111, give the FAA authority to withhold grants from sponsors when those conditions are not met. By requiring corrective action, the FAA helps the sponsor take steps necessary to retain grant eligibility. Orders to this effect are within the scope of the Director’s authority. As stated in the NPRM, proposed §§ 16.31(c) and 16.109(c) allow both flexibility and finality in the process.¹³

The FAA also finds it beneficial to both the agency and respondents to leave “Corrective Action Plan” undefined. These plans for bringing an airport sponsor into compliance with its federal obligations are dependent on the specific facts of each Part 16 proceeding. Defining this term could limit the FAA’s flexibility in ensuring sponsor compliance and a fair outcome for the parties.

The FAA has added language to § 16.34(a) and (c) to clarify the Director’s authority to determine whether or not to issue a consent order where parties propose to dispose of a case through the issuance of that order.

J. Deposition of FAA Employees (§ 16.215(e))

AAAE objected to the breadth of the provision allowing parties to depose agency employees only with written permission of the Chief Counsel. It suggested adding an exception to this rule.

¹³ 77 FR 13032.

The FAA finds an exception is unnecessary. As proposed in the NPRM, § 16.215(e) is consistent with the provisions of 49 CFR part 9, Testimony of Employees of the Department and Production of Records in Legal Proceedings.

K. Third Party Participation in Part 16 Hearings (§ 16.207)

The Port Authority believes that participation in Part 16 proceedings should be limited to third parties whose interests are sufficient to give them standing equal to that of a complainant or respondent.

The FAA believes that new provisions on third party participation are sufficiently restrictive to prevent the involvement of uninterested third parties. The current rule does not limit third party participation to the hearing stage, nor does it require a written motion to intervene. Changes proposed in the NPRM further restrict third party participation. The FAA is changing these provisions while maintaining the discretion of the hearing officer to admit parties necessary to ensure a fair, just, and complete process.

L. Miscellaneous Issues (§§ 16.13, 16.17, 16.19, 16.26, 16.33, 16.109, 16.111, and 16.245)

Several commenters noted typographical errors, omissions, and inconsistencies throughout the proposed regulatory text.

The FAA is addressing the following typographical errors, omissions, and inconsistencies identified by commenters:

- Removing “A facsimile neither constitutes an executed original nor one of the three copies required directly above” from § 16.13(c) (Port Authority and ACI);
- Replacing reference to paragraph (a) in § 16.33(c) with a reference to paragraph (b) (ACI); and
- Replacing “appeal” with “seek judicial review of” in § 16.245(d) for clarity and consistency with § 16.245(g) (Port Authority).

However, the FAA notes that the following suggested changes would not improve clarity, and is not implementing these recommendations:

- § 16.17(d) - The Port Authority noted that proposed § 16.17(d) contained confusing language and suggested changes;
- §§ 16.19 (e) and 16.17 – The Port Authority suggested repeating § 16.19(e) as § 16.17(e) to improve clarity;
- § 16.26(d) – The Port Authority (and ACI-NA by reference) suggested replacing the words “A reply to” with “a brief answering”;
- § 16.109 – The Port Authority suggested moving § 16.109 (c)-(g) to § 16.111 (a)-(e); and
- § 16.245(e) – The Port Authority suggested adding new language.

IV. Regulatory Notices and Analyses

Changes to Federal regulations must undergo several economic analyses. First, Executive Order 12866 and Executive Order 13563 direct that each Federal agency shall propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980 (Pub. L. 96–354) requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Trade Agreements Act (Pub. L. 96–39) prohibits agencies from setting standards that create unnecessary obstacles to the foreign commerce of the United States. In developing U.S. standards, the Trade Act requires agencies to consider international standards and, where appropriate, that they be the basis of U.S. standards. Fourth, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the

expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of \$100 million or more annually (adjusted for inflation with base year of 1995).

A. Regulatory Evaluation

DOT Order 2100.5 prescribes policies and procedures for simplification, analysis, and review of regulations. If the expected cost impact is so minimal that a proposed or final rule does not warrant a full evaluation, this order permits that a statement to that effect and the basis for it to be included in the preamble if a full regulatory evaluation of the cost and benefits is not prepared. Such a determination has been made for this final rule. The reasoning for this determination follows:

The FAA's Office of Airport Compliance and Management Analysis handles complaints made against federally-assisted airports. Part 16 provides a process for investigating and adjudicating complaints against airport operators for violation of federal obligations. This final rule clarifies and improves the efficiency of the current part 16 regulations for adjudicating complaints on matters within the agency's authority. These changes will be cost-beneficial because they decrease time spent and volume of paper documents required to process part 16 complaints. The new electronic filing process available to the government, complainants, and respondents will produce resource savings. Additionally, allowing a respondent to file a motion to dismiss, or a motion for summary judgment, will also produce resource savings.

The expected outcome will be a minimal impact with positive net benefits, and therefore a full regulatory evaluation was not prepared. The FAA requested comments regarding this determination in the NPRM. Because no comments were received on this determination, the FAA believes the expected outcome is correct. The FAA has therefore determined that this final rule is not a "significant regulatory action" as defined in section 3(f) of Executive Order 12866, and is not "significant" as defined in DOT's Regulatory Policies and Procedures.

Additionally, this action fulfills the principles of Executive Order 13563, specifically those relating to retrospective analyses of existing rules. This rule is being issued as a result of the reviews of existing regulations that the FAA periodically conducts. The FAA is streamlining its regulations to reflect changes in applicable law and regulations, and to apply lessons learned since the original rule was published in 1996.

B. Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (Pub. L. 96–354) (RFA) establishes “as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration.” The RFA covers a wide-range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions.

Agencies must perform a review to determine whether a rule will have a significant economic impact on a substantial number of small entities. If the agency determines that it will, the agency must prepare a regulatory flexibility analysis as described in the RFA.

However, if an agency determines that a rule is not expected to have a significant economic impact on a substantial number of small entities, section 605(b) of the RFA provides that the head of the agency may so certify and a regulatory flexibility analysis is not required. The certification must include a statement providing the factual basis for this determination, and the reasoning should be clear.

As noted above, the proposed changes to Part 16 are cost-relieving. Accordingly, the final rule will not have a significant economic impact on a substantial number of small entities. The

FAA certified in the NPRM that the proposed rule would not have a significant economic impact on a substantial number of small entities. The FAA requested comments regarding this determination in the NPRM. Specifically, the FAA requested comments on whether the proposed rule would create any specific compliance costs unique to small entities and requested any respondents to provide detailed economic analysis to support any cost claims. The FAA received no response to its request for comments.

Therefore, as the FAA Administrator, I certify that this final rule will not have a significant economic impact on a substantial number of small entities.

C. International Trade Impact Assessment

The Trade Agreements Act of 1979 (Pub. L. 96–39), as amended by the Uruguay Round Agreements Act (Pub. L. 103–465), prohibits Federal agencies from establishing standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. Pursuant to these Acts, the establishment of standards is not considered an unnecessary obstacle to the foreign commerce of the United States, so long as the standard has a legitimate domestic objective, such as the protection of safety, and does not operate in a manner that excludes imports that meet this objective. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards. The FAA assessed the potential effect of this proposed rule in the NPRM and determined that it would have only a domestic impact and therefore create no obstacles to the foreign commerce of the United States. The FAA received no comments on this determination. Therefore, the FAA determines that this final rule will have only a domestic impact and therefore create no obstacles to the foreign commerce of the United States.

D. Unfunded Mandates Assessment

Title II of the Unfunded Mandates Reform Act of 1995 (Public Law 104–4) requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in an expenditure of \$100 million or more (in 1995 dollars) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector; such a mandate is deemed to be a ‘significant regulatory action.’” The FAA currently uses an inflation-adjusted value of \$143.1 million in lieu of \$100 million. The NPRM found that the proposed rule did not contain such a mandate; and, therefore, the requirements of Title II of the Act did not apply. The FAA received no comments on this finding. Therefore, the FAA finds that this final rule does not contain such a mandate; and, therefore, the requirements of Title II of the Act do not apply.

E. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) requires that the FAA consider the impact of paperwork and other information collection burdens imposed on the public. The FAA has determined that there is no new requirement for information collection associated with this final rule.

F. International Compatibility

In keeping with U.S. obligations under the Convention on International Civil Aviation, it is FAA policy to conform to International Civil Aviation Organization (ICAO) Standards and Recommended Practices to the maximum extent practicable. The FAA has determined that there are no ICAO Standards and Recommended Practices that correspond to these regulations.

G. Environmental Analysis

FAA Order 1050.1E identifies FAA actions that are categorically excluded from preparation of an environmental assessment or environmental impact statement under the

National Environmental Policy Act in the absence of extraordinary circumstances. The FAA has determined this rulemaking action qualifies for the categorical exclusion identified in paragraph 312d of the Order and involves no extraordinary circumstances.

V. Executive Order Determinations

A. Executive Order 13132, Federalism

The FAA has analyzed this final rule under the principles and criteria of Executive Order 13132, Federalism. The agency determined that this action will not have a substantial direct effect on the States, or the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government, and, therefore, does not have Federalism implications.

B. Executive Order 13211, Regulations that Significantly Affect Energy Supply, Distribution, or Use

The FAA analyzed this final rule under Executive Order 13211, Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use (May 18, 2001). The agency has determined that it is not a “significant energy action” under the executive order and it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

VI. How to Obtain Additional Information

A. Rulemaking Documents

An electronic copy of a rulemaking document may be obtained by using the Internet —

1. Search the Federal eRulemaking Portal (<http://www.regulations.gov>);
2. Visit the FAA’s Regulations and Policies Web page at http://www.faa.gov/regulations_policies/ or
3. Access the Government Printing Office’s Web page at <http://www.gpo.gov/fdsys/>.

Copies may also be obtained by sending a request (identified by notice, amendment, or docket number of this rulemaking) to the Federal Aviation Administration, Office of Rulemaking, ARM-1, 800 Independence Avenue, SW, Washington, DC 20591, or by calling (202) 267-9680.

B. Comments Submitted to the Docket

Comments received may be viewed by going to <http://www.regulations.gov> and following the online instructions to search the docket number for this action. Anyone is able to search the electronic form of all comments received into any of the FAA's dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.).

C. Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 requires FAA to comply with small entity requests for information or advice about compliance with statutes and regulations within its jurisdiction. A small entity with questions regarding this document, may contact its local FAA official, or the person listed under the FOR FURTHER INFORMATION CONTACT heading at the beginning of the preamble. To find out more about SBREFA on the Internet, visit http://www.faa.gov/regulations_policies/rulemaking/sbre_act/.

List of Subjects in 14 CFR Part 16

Administrative practice and procedure, Airports, Investigations.

The Amendment

In consideration of the foregoing, the Federal Aviation Administration amends chapter I of title 14, Code of Federal Regulations as follows:

PART 16-- RULES OF PRACTICE FOR FEDERALLY-ASSISTED AIRPORT ENFORCEMENT PROCEEDINGS

1. The authority citation for part 16 is revised to read as follows:

Authority: 49 U.S.C. 106(g), 322, 1110, 1111, 1115, 1116, 1718 (a) and (b), 1719, 1723, 1726, 1727, 40103(e), 40113, 40116, 44502(b), 46101, 46104, 46110, 47104, 47106(e), 47107, 47108, 47111(d), 47122, 47123–47125, 47133, 47151–47153, 48103.

2. Amend § 16.1 by revising paragraphs (a) introductory text and (a)(3) through (6) to read as follows:

§ 16.1 Applicability and description of part.

(a) *General.* The provisions of this part govern all Federal Aviation Administration (FAA) proceedings involving Federally-assisted airports, except for complaints or requests for determination filed with the Secretary under 14 CFR part 302, whether the proceedings are instituted by order of the FAA or by filing a complaint with the FAA under the following authorities:

* * * * *

(3) The assurances and other Federal obligations contained in grant-in-aid agreements issued under the Federal Airport Act of 1946, 49 U.S.C. 1101 *et seq.* (repealed 1970).

(4) The assurances and other Federal obligations contained in grant-in-aid agreements issued under the Airport and Airway Development Act of 1970, as amended, 49 U.S.C. 1701 *et seq.*

(5) The assurances and other Federal obligations contained in grant-in-aid agreements issued under the Airport and Airway Improvement Act of 1982 (AAIA), as amended and recodified, 49 U.S.C. 47101 *et seq.*, specifically section 511(a), 49 U.S.C. 47107, and 49 U.S.C. 47133.

(6) Section 505(d) of the Airport and Airway Improvement Act of 1982, and the requirements concerning civil rights and/or Disadvantaged Business Enterprise (DBE) issues contained in 49

U.S.C. 47107(e) and 49 U.S.C. 47113; 49 U.S.C. 47123; 49 U.S.C. 322, as amended; 49 CFR parts 23 and/or 26; and/or grant assurance 30 and/or grant assurance 37.

* * * * *

3. Amend § 16.3 as follows:

- a. Remove the definitions of *Director's determination*, *File*, and *Final decision and order*;
- b. Revise the definitions of *Agency employee*, *Associate Administrator*, *Complaint*, *Director*, *Hearing officer*, *Mail*, and *Personal delivery*; and
- c. Add definitions for *Administrator*, *Agency*, *Decisional employee*, *Electronic filing*, *Ex parte communication*, and *Writing or written* in alphabetical order.

The revisions and additions read as follows:

§ 16.3 Definitions.

* * * * *

Administrator means the Administrator of the FAA;

Agency means the FAA.

* * * * *

Agency employee means any employee of the FAA.

Associate Administrator means the FAA Associate Administrator for Airports or a designee. For the purposes of this part only, Associate Administrator also means the Assistant Administrator for Civil Rights or a designee for complaints that the FAA Associate Administrator for Airports transfers to the Assistant Administrator for Civil Rights.

* * * * *

Complaint means a written document meeting the requirements of this part and filed under this part:

(1) By a person directly and substantially affected by anything allegedly done or omitted to be done by any person in contravention of any provision of any Act, as defined in this section, as to matters within the jurisdiction of the Administrator, or

(2) By a person under 49 CFR 26.105(c) against a recipient of FAA funds alleged to have violated a provision of 49 CFR parts 23 and/or 26.

Decisional employee means the Administrator, Deputy Administrator, Associate Administrator, Director, hearing officer, or other FAA employee who is or who may reasonably be expected to be involved in the decisional process of the proceeding.

Director means the Director of the FAA Office of Airport Compliance and Management Analysis, or a designee. For the purposes of this part only, Director also means the Deputy Assistant Administrator for Civil Rights for complaints that the Director of the FAA Office of Airport Compliance and Management Analysis transfers to the Deputy Assistant Administrator for Civil Rights or designee.

Electronic filing means the process of sending electronic mail (e-mail) to the FAA Part 16 Docket Clerk, with scanned documents attached, as a Portable Document Format (PDF) file.

Ex parte communication means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this part, or communications between FAA employees who participate as parties to a hearing pursuant to 16.203(b) of this part and other parties to a hearing.

Hearing officer means an attorney designated by the Deputy Chief Counsel in a hearing order to serve as a hearing officer in a hearing under this part. The following are not designated as hearing officers: the Chief Counsel and Deputy Chief Counsel; the Regional or Center Counsel

and attorneys in the FAA region or center in which the noncompliance has allegedly occurred or is occurring; the Assistant Chief Counsel and attorneys in the Airports and Environmental Law Division of the FAA Office of the Chief Counsel; and the Assistant Chief Counsel and attorneys in the Litigation Division of the FAA Office of Chief Counsel.

* * * * *

Mail means U.S. first class mail; U.S. certified mail; and U.S. express mail. Unless otherwise noted, mail also means electronic mail containing PDF copies of pleadings or documents required herein.

* * * * *

Personal delivery means same-day hand delivery or overnight express delivery service.

* * * * *

Writing or written includes paper documents that are filed and/or served by mail, personal delivery, facsimile, or e-mail (as attached PDF files).

4. Amend § 16.11 by revising the section heading and paragraphs (a) and (b) introductory text, and adding paragraphs (c) and (d) to read as follows:

§ 16.11 General processes.

(a) Under the authority of 49 U.S.C. 40113 and 47121, the Director may conduct investigations, issue orders, and take such other actions as are necessary to fulfill the purposes of this part. This includes the extension of any time period prescribed, where necessary or appropriate for a fair and complete consideration of matters before the agency, prior to issuance of the Director's Determination.

(b) Notwithstanding any other provision of this part, upon finding that circumstances require expedited handling of a particular case or controversy, the Director may issue an order directing any of the following prior to the issuance of the Director's Determination:

* * * * *

(c) Other than those matters concerning a Corrective Action Plan, the jurisdiction of the Director terminates upon the issuance of the Director's Determination. All matters arising during the appeal period, such as requests for extension of time to make an appeal, will be addressed by the Associate Administrator.

(d) The Director may transfer to the FAA Deputy Assistant Administrator for Civil Rights or Office of Civil Rights designee the authority to prepare and issue Director's Determinations pursuant to § 16.31 for complaints alleging violations of section 505(d) of the Airport and Airway Improvement Act of 1982, and the requirements concerning civil rights and/or Disadvantaged Business Enterprise (DBE) issues contained in 49 U.S.C. 47107(e) and 49 U.S.C. 47113; 49 U.S.C. 47123; 49 U.S.C. 322, as amended; 49 CFR parts 23 and/or 26; and/or grant assurance 30 and/or grant assurance 37.

5. Amend § 16.13 by revising paragraphs (a), (b), (c), (d), and (f) and adding paragraphs (h) and (i) to read as follows:

§ 16.13 Filing of documents.

* * * * *

(a) *Filing address.* Documents filed under this Part shall be filed with the Office of the Chief Counsel, Attention: FAA Part 16 Docket Clerk, AGC-600, Federal Aviation Administration, 800 Independence Avenue, SW, Washington, DC, 20591. Documents to be filed with a hearing officer shall be filed at the address and in the manner stated in the hearing order.

(b) *Date and method of filing.* Filing of any document shall be by personal delivery or mail as defined in this part, by facsimile (when confirmed by filing on the same date by one of the foregoing methods), or electronically as set forth in paragraph (h) of this section. Unless the date is shown to be inaccurate, documents filed with the FAA shall be deemed to be filed on the date of personal delivery, on the mailing date shown on the certificate of service, on the date shown on the postmark if there is no certificate of service, on the send date shown on the facsimile (provided filing has been confirmed through one of the foregoing methods), or on the mailing date shown by other evidence if there is no certificate of service and no postmark. Unless the date is shown to be inaccurate, documents filed electronically shall be deemed to be filed on the date shown on the certificate of service or, if none, the date of electronic transmission to the last party required to be served.

(c) *Number of copies.* With the exception of electronic filing or unless otherwise specified, an executed original and three copies of each document shall be filed with the FAA Part 16 Docket Clerk. One of the three copies shall not be stapled, bound or hole-punched. Copies need not be signed, but the name of the person signing the original shall be shown. If a hearing order has been issued in the case, one of the three copies shall be filed with the hearing officer unless otherwise prescribed by the hearing officer.

(d) *Form.* Documents filed under this part shall:

- (1) Be typewritten or legibly printed;
- (2) Include, in the case of docketed proceedings, the docket number of the proceeding on the front page; and

(3) Be marked to identify personal, privileged or proprietary information. Decisions for the publication and release of these documents will be made in accordance with 5 U.S.C. 552 and 49 CFR part 7.

* * * * *

(f) *Designation of person to receive service.* The initial document filed by any person shall state on the first page the name, physical address, telephone number, facsimile number, if any, and e-mail address, if filing electronically, of the person(s) to be served with documents in the proceeding. If any of these items change during the proceeding, the person shall promptly file notice of the change with the FAA Part 16 Docket Clerk and the hearing officer and shall serve the notice on all parties.

* * * * *

(h) *Electronic filing.* (1) The initial complaint may be served electronically upon the respondent only if the respondent has previously agreed with the complainant in writing to participate in electronic filing. Documents may be filed under this Part electronically by sending an e-mail containing (an) attachment(s) of (a) PDF file(s) of the required pleading to the FAA Docket Clerk, and the person designated in paragraph (h)(3) of this section.

(2) The subject line of the e-mail must contain the names of the complainant and respondent, and must contain the FAA docket number (if assigned). The size of each e-mail must be less than 10 MB. E-mail attachments containing executable files (e.g., .exe and .vbs files) will not be accepted.

(3) The e-mail address at which the parties may file the documents described in this section is 9-AWA-AGC-Part-16@faa.gov. No acknowledgement or receipt will be provided by the FAA to parties using this method. A party filing electronically as described in this section must provide

to the FAA Part 16 Docket Clerk and the opposing party an e-mail address of the person designated by the party to receive pleadings.

(4) By filing a pleading or document electronically as described in this section, a party waives the rights under this part for service by the opposing party and the FAA by methods other than e-mail. If a party subsequently decides to “opt-out” of electronic filing, that party must so notify the FAA Part 16 Docket Clerk and the other party in writing, from which time the FAA and the parties will begin serving the opting-out party in accordance with §§ 16.13 and 16.15. This subsection only exempts the parties from the filing and service requirements in § 16.13(a) (with the exception that “Documents to be filed with a hearing officer shall be filed at the address and in the manner stated in the hearing order.”), the method of filing requirements in § 16.13(b), and the number of documents requirements in § 16.13(c).

(i) *Internet accessibility of documents filed in the Hearing Docket.* (1) Unless protected from public disclosure, all documents filed in the Hearing Docket are accessible through the Federal Docket Management System (FDMS): <http://www.regulations.gov>. To access a particular case file, use the FDMS number assigned to the case.

(2) Determinations issued by the Director and Associate Administrator in Part 16 cases, indexes of decisions, contact information for the FAA Hearing Docket, the rules of practice, and other information are available on the FAA Office of Airports’ web site at:
<http://part16.airports.faa.gov/index.cfm>.

6. Amend § 16.15 by revising paragraphs (a), (b), (d)(1) and (d)(2), and adding paragraph (d)(3) to read as follows:

§ 16.15 Service of documents on the parties and the agency.

* * * * *

(a) *Whom must be served.* Copies of all documents filed with the FAA Part 16 Docket Clerk shall be served by the persons filing them on all parties to the proceeding. A certificate of service shall accompany all documents when they are tendered for filing and shall certify concurrent service on the FAA and all parties. Certificates of service shall be in substantially the following form:

I hereby certify that I have this day served the foregoing [name of document] on the following persons at the following addresses, facsimile numbers (if also served by facsimile), or e-mail address (if served electronically in accordance with § 16.13(h)), by [specify method of service]:

[list persons, addresses, facsimile numbers, e-mail addresses (as applicable)]

Dated this ____ day of ____, 20__.

[signature], for [party]

(b) Method of service. Except as otherwise agreed by the parties and, if applicable, the hearing officer, the method of service is the same as set forth in § 16.13(b) for filing documents.

* * * * *

(d) * * *

(1) When acknowledgment of receipt is by a person who customarily or in the ordinary course of business receives mail at the address of the party or of the person designated under § 16.13(f);

(2) When a properly addressed envelope, sent to the most current address submitted under § 16.13(f), has been returned as undeliverable, unclaimed, or refused; or

(3) When the party serving the document electronically has a confirmation statement demonstrating that the e-mail was properly sent to a party correctly addressed.

* * * * *

7. Amend § 16.17 by revising paragraph (c) to read as follows:

§ 16.17 Computation of time.

* * * * *

(c) Whenever a party has the right or is required to do some act within a prescribed period after service of a document upon the party, and the document is served on the party by first class mail or certified mail, 5 days shall be added to the prescribed period.

8. Amend § 16.19 by adding paragraphs (d) and (e) to read as follows:

§ 16.19 Motions.

* * * * *

(d) *Deferred actions on motions.* A ruling on a motion made before the time set for the issuance of the Director's Determination may be deferred to and included with the Director's Determination.

(e) *Extension by motion.* A party shall file a written motion for an extension of time not later than 3 business days before the document is due unless good cause for the late filing is shown. A party filing a motion for extension should attempt to obtain the concurrence of the opposing party. A party filing a written motion for an extension of time shall file the motion as required under § 16.13, and serve a copy of the motion on all parties and the docket clerk as required under § 16.15.

9. Revise § 16.21 to read as follows:

§ 16.21 Pre-complaint resolution.

(a) Except for those persons filing under 49 CFR 26.105(c), prior to filing a complaint under this part, a person directly and substantially affected by the alleged noncompliance shall initiate and engage in good faith efforts to resolve the disputed matter informally with those individuals or entities believed responsible for the noncompliance. These efforts at informal resolution may include, without limitation, at the parties' expense, mediation, arbitration, or the use of a dispute resolution board, or other form of third party assistance. The FAA Airports District Office, FAA Airports Field Office, FAA Regional Airports Division responsible for administering financial assistance to the sponsor, or the FAA Office of Civil Rights will be available upon request to assist the parties with informal resolution.

(b) Except for complaints filed under 49 CFR 26.105(c), a complaint will be dismissed under § 16.27 unless the person or authorized representative filing the complaint certifies that:

(1) The complainant has made substantial and reasonable good faith efforts to resolve the disputed matter informally prior to filing the complaint; and

(2) There is no reasonable prospect for practical and timely resolution of the dispute.

(c) The certification required under paragraph (b) of this section, shall include a brief description of the party's efforts to obtain informal resolution but shall not include information on monetary or other settlement offers made but not agreed upon in writing by all parties. Such efforts to resolve informally should be relatively recent and be demonstrated by pertinent documentation. There is no required form or process for informal resolution, but in each case the requirements to resolve the matter informally must meet the requirements of this paragraph.

10. Amend § 16.23 by revising the section heading; revising paragraphs (a), (b)(2), (b)(4), (c), (d), and (j); and adding paragraphs (k) and (l) to read as follows:

§ 16.23 Pleadings.

(a) A person directly and substantially affected by any alleged noncompliance or a person qualified under 49 CFR 26.105(c) may file a complaint under this part. A person doing business with an airport and paying fees or rentals to the airport shall be considered directly and substantially affected by alleged revenue diversion as defined in 49 U.S.C. 47107(b).

(b) * * *

(2) Include all documents then available in the exercise of reasonable diligence, to be offered in support of the complaint, and to be served upon all persons named in the complaint as persons responsible for the alleged action(s) or omission(s) upon which the complaint is based;

* * * * *

(4) Except for complaints filed under 49 CFR 26.105(c), describe how the complainant was directly and substantially affected by the things done or omitted to be done by the respondents.

(c) Unless the complaint is dismissed pursuant to § 16.25 or § 16.27, the FAA notifies the complainant and respondent in writing within 20 days after the date the FAA receives the complaint that the complaint has been docketed.

(d) The respondent shall file an answer within 20 days of the date of service of the FAA notification or, if a motion is filed under § 16.26, within 20 days of the date of service of an FAA order denying all or part of that motion.

* * * * *

(j) Amendments or supplements to the pleadings described in this section will not be allowed without showing good cause through a motion and supporting documents.

(k) *Burden of proof.* Except as used in subpart F of this part,

(1) The burden of proof is on the complainant to show noncompliance with an Act or any regulation, order, agreement or document of conveyance issued under the authority of an Act.

(2) Except as otherwise provided by statute or rule, the proponent of a motion, request, or order has the burden of proof.

(3) A party who has asserted an affirmative defense has the burden of proving the affirmative defense.

(l) Except for good cause shown through motion and supporting documents, discovery is not permitted except as provided in §§ 16.213 and 16.215.

11. Revise § 16.25 to read as follows:

§ 16.25 Dismissals

(a) Within 20 days after the receipt of the complaint, unless a motion has been filed under § 16.26, the Director will dismiss a complaint, or any claim made in a complaint, with prejudice if:

(1) It appears on its face to be outside the jurisdiction of the Administrator under the Acts listed in § 16.1;

(2) On its face it does not state a claim that warrants an investigation or further action by the FAA; or

(3) The complainant lacks standing to file a complaint under §§ 16.3 and 16.23.

(b) A dismissal under this section will include the reasons for the dismissal.

12. Add § 16.26 to read as follows:

§ 16.26 – Motions to dismiss and motions for summary judgment

(a) In lieu of an answer, the respondent may file a motion to dismiss the complaint or a motion for summary judgment on the complaint. The respondent may move for dismissal of the entire complaint or move for dismissal of particular issues from adjudication. The motion must be filed within 20 days after the date of service of the FAA notification of docketing.

(b) *Motions to dismiss.* (1) A motion to dismiss shall be accompanied by a concise statement of the reasons for seeking dismissal. The respondent must show that the complaint should be dismissed, with prejudice, if:

(i) It appears on its face to be outside the jurisdiction of the Administrator under the Acts listed in § 16.1;

(ii) On its face it does not state a claim that warrants an investigation or further action by the FAA; or

(iii) The complainant lacks standing to file a complaint under §§ 16.3 and 16.23.

(2) A motion to dismiss may seek dismissal of the entire complaint or the dismissal of specified claims in the complaint. A motion to dismiss shall be accompanied by a supporting memorandum of points and authorities.

(3) A complainant may file an answer to the motion to dismiss within 10 days of the date the motion is served on the complainant, or within any other period set by the Director. The answer shall be accompanied by a concise statement of reasons for opposing dismissal, and may be accompanied by affidavits and other documentary evidence in support of that contention.

(4) Within 30 days of the date an answer to a motion to dismiss is due under this section, the Director may issue an order disposing of the motion. If the Director denies the motion to dismiss

in whole or in part, or grants the motion in part, then within 20 days of when the order is served on the respondent, the respondent shall file an answer to the complaint.

(5) If the Director does not act on the motion to dismiss within 30 days of the date an answer to a motion is due under this section, the respondent shall file an answer to the complaint within the next 20 days.

(c) *Motions for summary judgment.* (1) A motion for summary judgment may be based upon the ground that there is no genuine issue of material fact for adjudication and that the complaint, when viewed in the light most favorable to the complainant, should be summarily adjudicated in favor of the respondent as a matter of law. A motion for summary judgment may seek dismissal of the entire complaint or dismissal of specified claims or issues in the complaint.

(2) The motion for summary judgment shall be accompanied by a concise statement of the material facts as to which the respondent contends there is no genuine issue of material fact. The motion may include affidavits and documentary evidence in support of the contention that there is no genuine issue of material fact in dispute.

(3) A complainant may file an answer to the motion for summary judgment within 10 days of the date the motion is served on the complainant, or within any other period set by the Director. The answer shall be accompanied by a concise statement of the material facts as to which the complainant contends there is a genuine issue, and may be accompanied by affidavits and other documentary evidence in support of that contention.

(4) Within 30 days of the date an answer to a motion for summary judgment is due under this section, the Director may issue an order disposing of the motion. If the Director denies the motion in whole or in part, or grants the motion in part, then within 20 days of when the order is served on the respondent, the respondent shall file an answer to the complaint.

(5) If the Director does not act on the motion for summary judgment within 30 days of the date an answer to a motion is due under this section, the respondent shall file an answer to the complaint within the next 20 days.

13. Revise § 16.27 to read as follows:

§ 16.27 Incomplete complaints.

(a) If a complaint is not dismissed pursuant to § 16.25, but is deficient as to one or more of the requirements set forth in § 16.21 or § 16.23(b), the Director will dismiss the complaint within 20 days after receiving it. Dismissal will be without prejudice to the refiling of the complaint after amendment to correct the deficiencies. The Director's dismissal will include the reasons for the dismissal.

(b) Dismissals under this section are not initial determinations, and appeals from decisions under this section will not be permitted.

14. In § 16.29, revise the first sentence of paragraph (b)(2) to read as follows:

§ 16.29 Investigations.

* * * * *

(b) * * *

(2) Obtaining additional oral and documentary evidence by use of the agency's authority to compel production of such evidence under 49 U.S.C. 40113 and 46104, and 49 U.S.C. 47122. *

* *

* * * * *

15. Revise § 16.31 to read as follows:

§ 16.31 Director's Determinations after investigations.

(a) After consideration of the pleadings and other information obtained by the FAA after investigation, the Director will render an initial determination and serve it upon each party within 120 days of the date the last pleading specified in § 16.23 was due.

(b)(1) The Director's Determination shall include findings of fact and conclusions of law, accompanied by explanations and based upon all material issues of fact, credibility of the evidence, law and discretion presented on the record, together with a statement of the reasons therefor.

(2) The Director shall issue a determination or rule in a party's favor only if the determination or ruling is in accordance with law and supported by a preponderance of the reliable, probative, and substantial evidence contained in the record.

(c) A party adversely affected by the Director's Determination may appeal the initial determination as provided in § 16.33. However, if the Director's Determination that is appealed contains a Corrective Action Plan, the Director has the discretion to suspend the Corrective Action Plan until the appeal is resolved.

(d) If the Director's Determination finds the respondent in noncompliance and proposes the issuance of a compliance order, the initial determination will include notice of opportunity for a hearing under subpart F of this part if a hearing is required by statute or otherwise provided by the FAA. A hearing may be required by statute if the FAA determination would terminate eligibility for grants under 49 U.S.C. 47114(c) or (e), or terminate payments on a grant agreement under 49 U.S.C. subchapter 471. The respondent may elect or waive a hearing, as provided in subpart E of this part.

(e) The Director will not consider requests for rehearing, reargument, reconsideration, or modification of a Director's Determination without a finding of good cause.

16. Revise § 16.33 to read as follows:

§ 16.33 Final decisions without hearing.

(a) The Associate Administrator may transfer to the FAA Assistant Administrator for Civil Rights the responsibility to prepare and issue Final Agency Decisions pursuant to this section for appeals with issues concerning civil rights.

(b) The Associate Administrator will issue a final decision on appeal from the Director's Determination, without a hearing, where—

(1) The complaint is dismissed after investigation;

(2) A hearing is not required by statute and is not otherwise made available by the FAA; or

(3) The FAA provides opportunity for a hearing to the respondent and the respondent waives the opportunity for a hearing as provided in subpart E of this part.

(c) In the cases described in paragraph (b) of this section, within 30 days after the date of service of the initial determination, a party adversely affected by the Director's Determination may file in accordance with § 16.13 and serve in accordance with § 16.15 a simultaneous Notice of Appeal and Brief.

(d) A reply to an appeal brief may be filed within 20 days after the date of service of the appeal.

(e) On appeal, the Associate Administrator will consider the issues addressed in any order on a motion to dismiss or motion for summary judgment and any issues accepted in the Director's Determination using the following analysis:

(1) Are the findings of fact each supported by a preponderance of reliable, probative, and substantial evidence contained in the record?

- (2) Are conclusions made in accordance with law, precedent and policy?
- (3) Are the questions on appeal substantial?
- (4) Have any prejudicial errors occurred?
- (f) Any new issues or evidence presented in an appeal or reply will not be considered unless accompanied by a petition and good cause found as to why the new issue or evidence was not presented to the Director. Such a petition must:
 - (1) Set forth the new matter;
 - (2) Contain affidavits of prospective witnesses, authenticated documents, or both, or an explanation of why such substantiation is unavailable; and
 - (3) Contain a statement explaining why such new issue or evidence could not have been discovered in the exercise of due diligence prior to the date on which the evidentiary record closed.
- (g) The Associate Administrator will issue a final decision and order within 60 days after the due date of the reply.
- (h) If no appeal is filed within the time period specified in paragraph (c) of this section, the Director's Determination becomes the final decision and order of the FAA without further action. A Director's Determination that becomes final, because there is no administrative appeal, is not judicially reviewable.
- (i) No requests for rehearing, reargument, reconsideration, or modification of a final order will be considered without a finding of good cause.

17. Add § 16.34 to subpart C to read as follows:

§ 16.34 Consent orders.

(a) The parties may agree at any time before the issuance of a final agency decision to dispose of the case by proposing a consent order. Good faith efforts to resolve a complaint through issuance of a consent order may continue throughout the administrative process. However, except as provided in § 16.11(a), such efforts may not serve as the basis for extensions of the times set forth in this part.

(b) A proposal for a consent order, specified in paragraph (a) of this section, shall include:

(1) A proposed consent order;

(2) An admission of all jurisdictional facts; and

(3) An express waiver of the right to further procedural steps and of all rights of judicial review.

(c) If the parties agree to dispose of a case by issuance of a consent order before the FAA issues a Director's Determination, the proposal for a consent order is submitted jointly by the parties to the Director, together with a request to adopt the consent order and dismiss the case. The Director may issue the consent order as an order of the FAA and terminate the proceeding.

§ 16.105 [Amended]

18. Amend § 16.105 by removing "determination" and adding "Determination" in its place.

19. Revise § 16.109 to read as follows:

§ 16.109 Orders terminating eligibility for grants, cease and desist orders, and other compliance orders.

(a) The agency will provide the opportunity for a hearing if, in the Director's determination, the agency issues or proposes to issue an order terminating eligibility for grants pursuant to 49

U.S.C. 47106(d), an order suspending the payment of grant funds pursuant to 49 U.S.C. 47111(d); an order withholding approval of any new application to impose a passenger facility charge pursuant to 49 U.S.C. 47111(e); a cease and desist order; an order directing the refund of fees unlawfully collected; or any other compliance order issued by the Administrator to carry out the provisions of the Acts, and required to be issued after notice and opportunity for a hearing. In cases in which a hearing is not required by statute, the FAA may provide opportunity for a hearing at its discretion.

(b) In a case in which the agency provides the opportunity for a hearing, the Director's Determination issued under § 16.31 will include a statement of the availability of a hearing under subpart F of this part.

(1) Within 20 days after service of a Director's Determination under § 16.31 that provides an opportunity for a hearing a person subject to the proposed compliance order may—

- (i) Request a hearing under subpart F of this part;
- (ii) Waive hearing and appeal the Director's Determination in writing, as provided in § 16.33;
- (iii) File, jointly with a complainant, a motion to withdraw the complaint and to dismiss the proposed compliance action; or
- (iv) Submit, jointly with the agency, a proposed consent order under § 16.34(c).

(2) If the respondent fails to file an appeal in writing within the time periods provided in paragraph (c) of this section, the Director's Determination becomes final.

(c) The Director may either direct the respondent to submit a Corrective Action Plan or initiate proceedings to revoke and/or deny the respondent's application for Airport Improvement

Program discretionary grants under 49 U.S.C. 47115 and general aviation airport grants under 49

U.S.C. 47114(d) when a Director's Determination finds a respondent in noncompliance and does not provide for a hearing.

(d) In the event that the respondent fails to submit, in accordance with a Director's Determination, a Corrective Action Plan acceptable to the FAA within the time provided, unless extended by the FAA for good cause, and/or if the respondent fails to complete the Corrective Action Plan as specified therein, the Director may initiate action to revoke and/or deny applications for Airport Improvement Program discretionary grants under 49 U.S.C. 47115 and general aviation airport grants under 49 U.S.C. 47114(d).

(e) For those violations that cannot be remedied through corrective action, the Director may initiate action to revoke and/or deny the respondent's applications for Airport Improvement Program discretionary grants under 49 U.S.C. 47115 and general aviation airport grants under 49 U.S.C. 47114(d).

(f) When the Director concludes that the respondent has fully complied with the Corrective Action Plan and/or when the Director determines that the respondent has corrected the areas of noncompliance, the Director will terminate the proceeding.

(g) A complainant's standing terminates upon the issuance of a Director's Determination that finds a respondent in noncompliance on all identified issues. The complainant may not appeal the Director's Determination if the Director finds noncompliance on all identified issues.

20. Amend § 16.201 by revising paragraph (b) to read as follows:

§ 16.201 Notice and order of hearing.

* * * * *

(b) Where there are no genuine issues of material fact requiring oral examination of witnesses, the hearing order may contain a direction to the hearing officer to conduct a hearing by submission of briefs and oral argument without the presentation of testimony or other evidence.

21. Amend § 16.203 by revising paragraphs (a)(1), (b)(1), and (b)(2) to read as follows:

§ 16.203 Appearances, parties, and rights of parties.

(a) * * *

(1) Any party may be accompanied, represented, or advised by an attorney licensed by a State, the District of Columbia, or a territory of the United States to practice law or appear before the courts of that State or territory, or by another person authorized by the hearing officer to be the party's representative.

* * * * *

(b) * * *

(1) The parties to the hearing are the complainant(s) and respondent(s) named in the hearing order, and the agency. The style of any pleadings filed under this Subpart shall name the respondent as the Appellant, and the Federal Aviation Administration as the Agency.

(2) Unless otherwise specified in the hearing order, the agency attorney will serve as prosecutor for the agency from the date of issuance of the Director's Determination providing an opportunity for hearing.

22. Revise § 16.207 to read as follows:

§ 16.207 Intervention and other participation.

(a) Intervention and participation by other persons are permitted only at the hearing stage of the complaint process and with the written approval of the hearing officer.

(b) A person may submit a written motion for leave to intervene as a party. Except for good cause shown, a motion for leave to intervene shall be submitted not later than 10 days after the notice of hearing and hearing order.

(c) If the hearing officer finds that intervention will not unduly broaden the issues or delay the proceedings and, if the person has an interest that will benefit the proceedings, the hearing officer may grant a motion for leave to intervene. The hearing officer may determine the extent to which an intervenor may participate in the proceedings.

(d) Other persons may petition the hearing officer for leave to participate in the hearing. Participation is limited to the filing of a posthearing brief and reply to the hearing officer and the Associate Administrator. Such a brief shall be filed and served on all parties in the same manner as the parties' posthearing briefs are filed.

(e) Participation under this section is at the discretion of the hearing officer, and no decision permitting participation shall be deemed to constitute an expression that the participant has such a substantial interest in the proceeding as would entitle it to judicial review of such decision.

23. In § 16.211, revise the last sentence in paragraph (c) to read as follows:

§ 16.211 Prehearing conference.

* * * * *

(c) * * * In addition, the hearing officer establishes the schedule, which shall provide for the issuance of an initial decision not later than 110 days after issuance of the Director's Determination order unless otherwise provided in the hearing order.

24. Amend § 16.215 by adding paragraph (e) to read as follows:

§ 16.215 Depositions.

* * * * *

(e) *Depositions of agency employees.* (1) Depositions of Agency Employees will not be allowed except under the provisions of 49 CFR part 9.

(2) Such depositions will be allowed only with the specific written permission of the Chief Counsel or his or her designee.

25. Revise § 16.227 to read as follows:

§ 16.227 Standard of proof.

The hearing officer shall issue an initial decision or rule in a party's favor only if the decision or ruling is in accordance with law and supported by a preponderance of the reliable, probative, and substantial evidence contained in the record.

26. Amend § 16.229 by adding introductory text to read as follows:

§ 16.229 Burden of proof.

As used in this subpart, the burden of proof is as follows:

* * * * *

27. Revise § 16.233 to read as follows:

§ 16.233 Record.

(a) *Exclusive record.* The transcript of all testimony in the hearing, all exhibits received into evidence, all motions, applications requests and rulings, all documents included in the hearing

record and the Director's Determination shall constitute the exclusive record for decision in the proceedings and the basis for the issuance of any orders.

(b) *Examination and copy of record.* A copy of the record will be filed by the FAA Part 16 Docket Clerk in the Federal Docket Management System (FDMS). Any person desiring to review the record may then do so at <http://www.regulations.gov>.

28. Amend § 16.235 by revising paragraph (b) to read as follows:

§ 16.235 Argument before the hearing officer.

* * * * *

(b) *Posthearing briefs.* The hearing officer may request or permit the parties to submit posthearing briefs. The hearing officer may provide for the filing of simultaneous reply briefs as well, if such filing will not unduly delay the issuance of the hearing officer's initial decision. Posthearing briefs shall include proposed findings of fact and conclusions of law; exceptions to rulings of the hearing officer; references to the record in support of the findings of fact; and supporting arguments for the proposed findings, proposed conclusions, and exceptions.

§§ 16.241 and 16.243 [Transferred to Subpart F]

29. Sections 16.241 and 16.243 are transferred from subpart G to subpart F.

Subpart G—[Removed and Reserved]

30. Remove and reserve subpart G.

31. Amend § 16.241 by revising paragraphs (a) and (c) and removing paragraph (f).

The revisions read as follows:

§ 16.241 Initial decisions, order, and appeals.

(a) The hearing officer shall issue an initial decision based on the record developed during the proceeding and shall send the initial decision to the parties not later than 110 days after the Director's Determination unless otherwise provided in the hearing order.

* * * * *

(c) If an appeal is filed, the Associate Administrator reviews the entire record and issues a final agency decision and order within 60 days of the due date of the reply. If no appeal is filed, the Associate Administrator may take review of the case on his or her own motion. If the Associate Administrator finds that the respondent is not in compliance with any Act or any regulation, agreement, or document of conveyance issued or made under such Act, the final agency order includes, in accordance with § 16.245(d), a statement of corrective action, if appropriate, and identifies sanctions for continued noncompliance.

* * * * *

32. Add § 16.245 to subpart F to read as follows:

§ 16.245 Associate Administrator review after a hearing.

(a) The Associate Administrator may transfer to the FAA Assistant Administrator for Civil Rights the authority to prepare and issue Final Agency Decisions pursuant to § 16.241 for appeals from a hearing concerning civil rights issues.

(b) After a hearing is held, and, after considering the issues as set forth in § 16.245(e), if the Associate Administrator determines that the hearing officer's initial decision or order should be changed, the Associate Administrator may:

(1) Make any necessary findings and issue an order in lieu of the hearing officer's initial decision or order, or

(2) Remand the proceeding for any such purpose as the Associate Administrator may deem necessary.

(c) If the Associate Administrator takes review of the hearing officer's initial decision on the Associate Administrator's own motion, the Associate Administrator will issue a notice of review within 20 days of the actual date the initial decision is issued.

(1) The notice sets forth the specific findings of fact and conclusions of law in the initial decision that are subject to review by the Associate Administrator.

(2) Parties may file one brief on review to the Associate Administrator or rely on their posthearing brief to the hearing officer. A brief on review shall be filed not later than 10 days after service of the notice of review. Filing and service of a brief on review shall be by personal delivery.

(3) The Associate Administrator issues a final agency decision and order within 30 days of the due date of the brief. If the Associate Administrator finds that the respondent is not in compliance with any Act or any regulation, agreement or document of conveyance issued under such Act, the final agency order includes a statement of corrective action, if appropriate.

(d) When the final agency decision finds a respondent in noncompliance, and where a respondent fails to properly seek judicial review of the final agency decision as set forth in subpart G of this

part, the Associate Administrator will issue an order remanding the case to the Director for the following action:

(1) In the event that the respondent fails to submit, in accordance with the final agency decision, a Corrective Action Plan acceptable to the FAA within the time provided, unless extended by the FAA for good cause, and/or if the respondent fails to complete the Corrective Action Plan as specified therein, the Director may initiate action to revoke and/or deny applications for Airport Improvement Program grants issued under 49 U.S.C. 47114(c)-(e) and 47115. When the Director concludes that the respondent has fully complied with the Corrective Action Plan, the Director will issue an Order terminating the proceeding.

(2) For those violations that cannot be remedied through corrective action, the Director may initiate action to revoke and/or deny the respondent's applications for Airport Improvement Program grants issued under 49 U.S.C. 47114(c)-(e) and 47115.

(e) On appeal from a hearing officer's initial decision, the Associate Administrator will consider the following questions:

(1) Are the findings of fact each supported by a preponderance of reliable, probative and substantial evidence?

(2) Are conclusions made in accordance with law, precedent and policy?

(3) Are the questions on appeal substantial?

(4) Have any prejudicial errors occurred?

(f) Any new issues or evidence presented in an appeal or reply will not be allowed unless accompanied by a certified petition and good cause found as to why the new matter was not presented to the Director. Such a petition must:

(1) Set forth the new issues or evidence;

- (2) Contain affidavits of prospective witnesses, authenticated documents, or both, or an explanation of why such substantiation is unavailable; and
- (3) Contain a statement explaining why such new matter could not have been discovered in the exercise of due diligence prior to the date on which the evidentiary record closed.
- (g) A Final Agency Decision may be appealed in accordance with subpart G of this part.

Subparts H and I [Redesignated as Subparts G and H]

33. Redesignate subpart H, consisting of § 16.247, and subpart I, consisting of §§ 16.301, 16.303, 16.305, and 16.307, as subparts G and H, respectively.

34. In § 16.247, revise paragraphs (a), (b)(2), and (b)(4) to read as follows:

§ 16.247 Judicial review of a final decision and order.

(a) A person may seek judicial review, in a United States Court of Appeals, of a final decision and order of the Associate Administrator, and of an order of dismissal with prejudice issued by the Director, as provided in 49 U.S.C. 46110 or 49 U.S.C. 47106(d) and 47111(d). A party seeking judicial review shall file a petition for review with the Court not later than 60 days after the order has been served on the party or within 60 days after the entry of an order under 49 U.S.C. 46110

(b) * * *

(2) A Director's Determination;

* * * * *

(4) A Director's Determination or an initial decision of a hearing officer becomes the final decision of the Associate Administrator because it was not appealed within the applicable time periods provided under §§ 16.33(c) and 16.241(b).

§ 16.301 [Removed]

35. Remove § 16.301 from newly redesignated subpart H.

§§ 16.303, 16.305, and 16.307 [Redesignated as §§ 16.301, 16.303, and 16.305]

36. In newly redesignated subpart H, redesignate §§ 16.303, 16.305, and 16.307 as §§ 16.301, 16.303, and 16.305, respectively.

Issued under authority provided by 49 U.S.C. 106(f), 46101, 46104, and 47122 in Washington, DC, on August 23, 2013.

Michael P. Huerta
Administrator

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